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Supreme Court, U.S.
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No. 02-1189

IN THE

Supreme Court of the United States

October Term, 2003

RICARDO ORTIZ
Petitioner,

v.

THE STATE OF TEXAS
Respondent.

On Petition for Writ of Certiorari to
The Court of Criminal Appeals of Texas

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

JAMES D. LUCAS
Counsel of Record
303 Texas Avenue, Suite 806
El Paso, Texas 79901
Tel. (915) 532-8811
Fax (915) 532-8807

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1. Respondent erroneously asserts that Petitioner's constitutional challenge to the facial validity of Article 35.16(b)1 was procedurally defaulted.

On page 14 of its brief, Respondent states: "Furthermore, to the extent Ortiz seeks review of the manner in which the statute [Article 35.16(b)1] was applied to the jurors in this case, the Court of Criminal Appeals found his claims to be procedurally defaulted under the contemporaneous objection rule." It carries forward its procedural default analysis at page 19 of its brief, arguing that it constitutes an adequate and independent state ground which precludes review by this Court. These assertions misrepresent the record. The Court of Criminal Appeals' opinion reflects that it rejected Petitioner's facial challenge to Article 35.16(b)1 (ground of error two of Petitioner's brief) after concluding that it had previously narrowed the construction of the Article 35.16(b)1 to what is constitutionally permissible, and could "perceive no further basis for complaint." (see opinion pages 16a and 17a, Appendix to original writ petition)

The Court of Criminal Appeals then turned to Petitioner's ninth ground of error -- which was that his trial counsel rendered ineffective assistance by allowing several prospective jurors to be removed for cause in violation of this Court's decision in Wainright v. Witt, 469 U.S. 412 (1985).[1]

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[1] Ground of error nine alleged: "By allowing, without objection, several prospective jurors to be disqualified for cause solely because of their conscientious scruples in regard to the infliction of the death penalty, trial counsel for Ortiz rendered ineffective assistance of counsel." See Petitioner's brief to the Court of Criminal Appeals, p. 69. Grounds of error ten and thirteen were drafted on the assumption that Witherspoon error had not been waived and alleged that Petitioner's right to a fair and impartial jury under the Sixth and Fourteenth Amendments had been violated. Id. at 125, 130.

The opinion states: "Ortiz next contends that a number of jurors were excused in violation of *Witt*." Id. The opinion then proceeds to address Petitioner's ninth ground of error -- and grounds ten and thirteen as well -- by concluding that Petitioner waived Witt error by not objecting to the removal of these jurors at the trial court level.

2. Respondent erroneously asserts that Petitioner's facial challenge to Article 35.16(b)1 was waived.

The Court of Criminal Appeals' refusal to find that Petitioner had waived error on his facial challenge to Article 35.16(b)1 is understandable. Ever since its decision in Rabb v. State, 730 S.W.2d 751 (Tex.Crim.App. 1987), the Court of Criminal Appeals has recognized that "[q]uestions involving the constitutionality of a statute upon which a defendant's conviction is based should be addressed by appellate courts, even when such issues are raised for the first time on appeal." (see Rabb at 752). In Briggs v. State, 789 S.W.2d 918 Tex.Crim.App. 1990), the Court of Criminal Appeals modified the Rabb rule. It held that while such an objection was necessary at the trial court level to preserve a constitutional challenge to a statute as applied, no such objection was necessary to preserve error to a facial challenge. Id. at 919, 924. The decision also reaffirmed the validity of the Court of Criminal Appeals' prior decision in Rose v. State, 752 S.W.2d 529 (Tex.Crim.App. 1988), a case which recognized the right of an appellant to raise for the first time on appeal a constitutional challenge to the facial validity of a mandatory parole instruction statute. The Briggs limitations was carried forward in Garcia v. State, 887 S.W.2d 846 (Tex.Crim.App. 1994, where the Court of Criminal Appeals noted the following in rejecting the appellant's "as applied" challenge:

> The State asserts, and appellant concedes, that no objection was raised, nor any motion made, at trial

> concerning the constitutional operation of the statute as it pertained to appellant with respect to these three points of error. Because Article 37.071 was not facially unconstitutional ..., appellant was required to object at trial in order to preserve any error for purposes of appeal. Garcia, supra at 861.

The same analysis was applied in Holberg v. State, 38 S.W.3d 137, cert. denied, 534 U.S. 972 (2001). The appellant there argued for the first time on direct appeal that Texas Penal Code Section 19.03 and Article 37.071 of the Texas Code of Criminal Procedure were unconstitutional on their face. Id. at 139. Citing Rabb v. State, supra, the Court of Criminal Appeals refused to find waiver and observed that "Although appellant made no such objection in the trial court, we have held that "[q]uestions involving the constitutionality of a statute upon which a defendant's conviction is based should be addressed by appellate courts, even when such issues are raised for the first time on appeal." Id. at f.n. 7.

Every one of the 14 intermediate courts of appeal in Texas has followed the Court of Criminal Appeals lead and concluded that a facial constitutional challenge to a criminal statute can be raised for the first time on appeal. See e.g. Cartier v. State, 58 S.W.3d 756, 759 (Tex.App.-Amarillo 2001, pet. ref'd)(stating that unlike an "as applied" challenge to a statute, "a challenge that a statute is unconstitutional on its face can be considered even when raised for the first time on appeal because if a statute upon which a conviction is based is unconstitutional, 'it is void from its inception, is no law, confers no rights, bestows no power on anyone, and justifies no act performed under it.'"; Bader v. State, 15 S.W.3d 599, 603 (Tex.App.-Austin 2000, pet. ref'd)(same); Sullivan v. State, 986 S.W.2d 708, 711 (Tex.App.-Dallas 1999, no pet)(same); McGowan v. State, 938 S.W.2d 732, 740 (Tex.App.-Houston [14th Dist.] 1997, no pet.)(same); Rodriguez v. State, 71

S.W.3d 800, 802 (Tex.App.-Texarkana 2002, no pet.)(same); Stewart v. State, 13 S.W.3d 127, 130 (Tex.App.- Houston [1st Dist] 2000, pet. ref'd)(same); Battles v. State, 45 S.W.3d 694, 702-03 (Tex.App.--Tyler 2001, no pet.)(same); Sisk v. State 74 S.W.3d 893, 895-896 (Tex.App.-Fort Worth 2002, no pet.)(same); Webb v. State, 899 S.W.2d 814, 817-818 (Tex.App.-Waco 1995, pet. ref'd)(same); Gilliam v. State, 746 S.W.2d 323, f.n. 1 (Tex.App.-Eastland 1988, no pet.)(same); Turner v. State, No. 08-01-00360-CR (Tex.App.-El Paso August 29, 2002) (unpublished opinion, same); Hawkins v. State, 964 S.W.2d 767, 770 (Tex.App.-Beaumont 1998, pet. ref'd)(same); and In re Torres, 966 S.W.2d 723, 724-725 (Tex.App.-San Antonio 1998, no pet.)(same).

Suffice it to say, not one decision can be found to support Respondent's assertion that a facial challenge to the constitutionality of a criminal statute is subject to the contemporaneous objection rule. This explains why the Court of Criminal Appeals never ruled that Petitioner's failure to challenge the facial validity of Article 35.16(b)1 at the trial court level resulted in waiver of error. Based on clearly established law, it realized that no waiver of error could occur where a facial challenge is asserted to a criminal statute.

3. Respondent erroneously asserts that the "conscientious scruples" provision of Article 35.16(b)1 has been interpreted by the Court of Criminal Appeals.

Respondent asserts that "the Court of Criminal Appeals has consistently interpreted the "conscientious scruples" provision of this statute [Article 35.16(b)1] to permit a venire member to be disqualified from service in a capital case *only* where the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with instructions and his oath." See page 18 of its brief. It cites the

following cases for this proposition: Holberg v. State, 38 S.W.3d 137, 141 (Tex.Crim.App.), cert denied, 534 U.S. 972 (2001); Ramos v. State, 934 S.W.2d 358, 366 (Tex.Crim.App. 1996); McFarland v. State, 928 S.W.2d 482, 509 n. 24 (Tex.Crim.App. 1996); Wolfe v. State, 917 S.W.2d 270, 275-276 (Tex.Crim.App. 1996); Cuevas v. State, 742 S.W.2d 331, 334 (Tex.Crim.App. 1987); and Ortiz v. State, 93 S.W.3d 79 (Tex.Crim.App. 2002) - the case which involves Petitioner.

However, Respondent's cited authorities are not instructive. Witt is not cited on page 141 or anywhere else in the Holberg opinion, as Respondent asserts. In Ramos, the appellant did not contend that prospective jurors were removed in violation of Witt, but attacked the constitutionality of the Witt standard itself. See Ramos at p. 366. Wolfe is also inapposite. No challenge was made to Article 35.16(b)1 and the issue addressed was whether the trial court had erroneously violated Witt in granting two of the State's challenges for cause. The Court of Criminal Appeals also did not endeavor to interpret Article 35.16(b)1, or purport to define any provision of the statute.

Respondent's reliance on footnote 24 in McFarland v. State, supra, is of no value either. Aside from addressing appellant's equal protection claim, the footnote does not interpret Article 35.16(b)1 or define any of its provisions. The one noteworthy aspect of the footnote is its acknowledgment that Article 35.16(b)1 should not be applied contrary to the standards set forth in Witt. Accordingly, rather than hurting Petitioner's claim, the footnote supports Petitioner's claim that Article 35.16(b)1 is facially unconstitutional. Respondent's citation to Cuevas v. State is also misplaced. Nothing in this opinion purports to interpret the meaning of Article 35.16(b)1 or to define any word or phrase in the statute. As in Wolfe, the only issue raised was whether prospective jurors were excused in violation of Witt. Again, no challenge was lodged to the

constitutionality of Article 35.16(b)1, as in Petitioner's case. Respondent's reading of Ortiz is also misplaced. Respondent's assertion that "a juror cannot be disqualified under Article 35.16(b)(1) if he is acceptable under Adams and Witt" does not correctly state the holding of Ortiz. The Court of Criminal Appeals in Ortiz held that Ortiz had presented nothing for review with regard to ground of error two because the statute had previously been given a narrowing construction. See Ortiz v. State, (See Pet. App. 16a -17a). Thus, Respondent's claim that the "Texas courts have tethered the statute's requirements to the constitutional standards announced by this Court" is not accurate. If the statute was so "tethered", the Court of Criminal Appeals would have decided Petitioner's constitutional challenge to Article 35.16(b)1. But it did not. For this reason, none of Respondent's cited authorities either interpret or demonstrate a narrowing construction of Article 35.16(b)1.

4. Respondent erroneously asserts that it was a legitimate trial strategy for Petitioner's trial counsel to strike all thirteen prospective jurors from the venire panel.

Respondent argues that it was a legitimate trial strategy for the trial court to exclude 13 prospective jurors who, "whether for religious or philosophical or any other reason ... believe[d] that the death penalty *should never be inflicted in any case, regardless of what the evidence might be*." (quoting from p. 26 of Respondent's brief). Respondent's contention overlooks this Court's holding in Witt, which recognized that the State cannot remove prospective jurors merely because they are opposed to the death penalty. The test is whether prospective jurors can perform their duties as jurors in accordance with their oath and the instructions given to them. It is only when jurors' views prevent or substantially impair them from performing their obligation as jurors that they are subject to challenge for cause. See Witt, 469 U.S. at 424-426.

5. Respondent mis-characterizes Petitioner's facial challenge to the constitutionality of Article 35.16(b)1 as being an "as applied" challenge.

On page 19 of its brief, Respondent states that Petitioner "repeatedly characterizes the argument included in his petition as a 'facial' challenge to the constitutionality of Article 35.16(b)(1)...." In the same paragraph, Respondent asserts that "simple reference to the lower court's decision reveals that the court declined to consider the merits of Ortiz' 'as applied' claim because of an independent state procedural default." Id. As the Court of Criminal Appeals' opinion in Ortiz bears out, Petitioner never asserted an "as applied" challenge to Article 35.16(b)1 at the trial court level. Petitioner confined himself to arguing that Article 35.16(b)1 was unconstitutional on its face. Whether Petitioner erred in attacking the constitutionality of Article 35.16(b)1 as facially invalid rather than "as applied" is for this Court to decide. But Respondent has no right to characterize Petitioner's "facial" challenge as an "applied" challenge when the record clearly and unequivocally reflects that Petitioner has consistently asserted that Article 35.16(b)1 is unconstitutional on its face.[2] Respondent's claim that

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Ironically, Respondent describes Petitioner's challenge to Article 35.16(b)1 as an "applied challenge" but never once attempts to interpret Article 35.16(b)1 in accordance with its plain meaning. In Hernandez v. State, 757 S.W.2d 744, 750 f.n. 10 (Tex.Crim.App. 1988)(en banc), the Court of Criminal Appeals observed that although "the statute law [Article 35.16] still does" authorize a challenge for cause, the "effect of Witherspoon ... was effectively to remove the exception from Texas law on constitutional grounds...." Article 35.16(b)1 therefore must be contrasted with statutes such as Article 37.071, which suffer from no glaring defect. See e.g. Penry v. Lynaugh, 109 S.Ct. 2934, 2952 (1989)(holding that Art. 37.071 was unconstitutional as applied to Penry only because the punishment issues did not provide the jury with an opportunity to give mitigating effect to the punishment evidence in his case). Article 35.16(b)1 is facially invalid because it authorizes the State to remove for

Petitioner's trial counsel may have had other reasons for allowing the State to systematically remove every prospective juror from the venire panel with conscientious scruples is also without merit. Respondent does not deny that the State challenged for cause all prospective jurors who had conscientious scruples in regard to the death penalty. Thus, Respondent recognizes that it was not an isolated prospective juror with conscientious scruples who was removed by the State from the venire panel, but the entire panel of such jurors. This showing alone establishes that Petitioner trial counsel's failure to object was not the result of trial strategy, but of ignorance and a mistaken belief that Article 35.16(b)1 was to be applied to the letter. No competent trial counsel defending a person charged with a capital crime would have concluded that allowing only "death qualified" jurors with no conscientious scruples to sit in judgment of Petitioner could possibly be an objectively reasonable trial strategy.

6. Respondent erroneously asserts that Petitioner does not contest that the contemporaneous objection rule precludes federal review of this writ petition.

On page 16 of his petition for writ of certiorari, Petitioner appraised this Court of several Texas case authorities

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cause all prospective jurors who have any negative attitude or belief regarding the death penalty, or any sensibilities or reservations as to its use, whether reasonable or not. Thus, Article 35.16(b)1 irreconcilably conflicts with Witherspoon and its progeny of case authority because it recognizes no due process limitation on the power of the State to exclude prospective jurors from serving on a death penalty jury. On its face, the statute violates a defendant's right under the Sixth Amendment and Fourteenth Amendments to a fair and impartial jury. Moreover, from a constitutional perspective, the statute is identical to the statute declared unconstitutional by this Court in Witherspoon over 30 years ago. As recognized by the Hernandez Court, the decision in Witherspoon itself resolves the issue that Article 35.16(b)1 is unconstitutional on its face.

which recognized the right of an appellant to assert a facial challenge to the constitutionality of Article 35.16(b)1 for the first time on appeal. Nevertheless, Respondent asserts that Petitioner does not contest that the Texas contemporaneous objection rule constitutes an adequate and independent state ground to bar federal review of Petitioner's claim. See Respondent's brief, page 20. This assertion is false and should be disregarded.

7. Respondent erroneously states that removing prospective jurors solely because of their conscientious scruples in regard to the death penalty does not state a claim with substantive merit.

Respondent's claim that all 13 of the prospective jurors identified by Petitioner expressed an unwavering opposition to the death penalty and explicitly confirmed that they would oppose the death penalty in every circumstance are incorrect statements of fact. These prospective jurors were not asked whether they could follow the law as given by the trial court. They were just asked to identify whether they had conscientious scruples in regard to the death penalty. Therefore, there is no way of knowing whether any of the referenced jurors would have been able to perform their duties in accordance with their oath and the instructions of the trial court.

8. Respondent erroneously disputes Petitioner's claim that the Court of Criminal Appeals has failed to narrow the construction of Article 35.16(b)1.

On page 19 of its brief, Respondent disputes Petitioner's claim that the Court of Criminal Appeals failed to apply a narrowing construction to Article 35.16(b)1. Although Respondent concedes that the Court of Criminal Appeals did not apply a narrowing construction to the statute, it nonetheless asserts that the Court of Appeals "declined to consider"

Petitioner's constitutional challenge to Article 35.16(b)1 because Petitioner failed to object at the trial court level to the trial court's removal for cause of 13 prospective jurors. As noted above, the trial court's opinion does not support the "implied finding" Respondent claims exists. With regard to Petitioner's facial challenge to the constitutionality of Article 35.16(b)1, the Court of Criminal Appeals *expressly* held that nothing was presented for review because a narrowing construction had previously been applied to the statute. It is in regard to grounds of error nine, ten and thirteen that the Court of Criminal Appeals' opinion reflects that error was waived. All of these grounds of error concern Petitioner's failure to preserve Witherspoon-Witt error. The Court of Criminal Appeals' determination that Petitioner had waived error as to these grounds of error is consistent with both federal and Texas law. Its refusal to find that Petitioner had waived error with regard to his constitutional challenge to Article 35.16(b)1 is also consistent with clearly-established law. Every appellate court in Texas had recognized that a facial constitutional challenge to a statute can never be waived. Respondent's assertion that Petitioner has waived error with regard to his constitutional challenge to the facial validity of Article 35.16(b)1 is therefore untrue. This ground of error has not been waived.

CONCLUSION

For reasons outlined above, Petitioner submits that his petition for writ of certiorari should be granted.

Respectfully submitted,

JAMES D. LUCAS
Counsel of Record
303 Texas Ave; Suite 806
El Paso, Texas 79901
Tel. (915) 432-8811